

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRODY JACK JOHNSON,

Defendant-Appellant.

UNPUBLISHED

September 16, 2014

No. 316052

St. Joseph Circuit Court

LC No. 12-018262-FH

Before: SHAPIRO, P.J., and WHITBECK and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of operating or maintaining a laboratory involving methamphetamine, MCL 333.7401c(2)(f). Defendant was sentenced as a second controlled substance offender, MCL 333.7413(2)(a), to 4 to 40 years' imprisonment, with credit for 170 days' jail time. We affirm.

An off-duty police officer observed defendant, a suspect in a retail fraud case, walking down the street. The defendant was subsequently located and questioned by other officers at an abandoned property owned by the city of Three Rivers. After the other officers briefly spoke with defendant, they were dispatched to other calls. The off-duty officer further investigated the situation, however, and found numerous items used to manufacture methamphetamine under a cover at the same abandoned property. A tent was located not far from the items under the cover. The tent contained other items that also could be used in the manufacture and sale of methamphetamine as well as materials that linked the defendant to the tent. Defendant was arrested and charged.

Defendant first challenges the admission of trial testimony by several police officers regarding the fact that defendant was also a suspect in a retail fraud case involving the theft of one or more substances used in the manufacture of methamphetamine. This claim of error was not preserved at trial. Defendant's unpreserved evidentiary and constitutional objections to the admission of evidence are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Pursuant to this standard of review, defendant bears the burden of showing the existence of a clear or obvious error and must demonstrate "prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* at 763-764. Even when there is a showing of plain error affecting substantial rights, reversal is warranted only when the plain error "resulted in the conviction of an actually innocent

defendant or when an error ‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” *Id.* (citations and quotation marks omitted).

We disagree with defendant’s claim that these statements were improperly admitted. Michigan Rule of Evidence 404(b) prohibits the use of evidence of other acts to prove action in conformity therewith. However, evidence is not subject to analysis under MRE 404(b) merely because it discloses a bad act. *People v Houston*, 261 Mich App 463, 468-469; 683 NW2d 192 (2004), citing *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993). Indeed, evidence may be admissible pursuant to MRE 401, MRE 402, and MRE 403 without implication of MRE 404(b). *Houston*, 261 Mich App at 466.

In the present case, the testimony that defendant was a suspect in a retail fraud case involving the theft of one or more substances used to manufacture methamphetamine was properly admitted as *res gestae* evidence.¹ *Res gestae* evidence is admissible without regard to MRE 404(b) because this evidence is relevant to give context to a case. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996); *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). In the present case, the challenged testimony of the officers was relevant to explain how the police initially recognized defendant and why they followed him to abandoned, city-owned property. Because this testimony was relevant pursuant to MRE 401 as *res gestae* evidence, it was also admissible pursuant to MRE 402. Any prejudice from defendant’s claim of unpreserved error was cured when the trial court twice instructed the jury *sua sponte* on the proper *res gestae* use of the testimony. *People v McLaughlin*, 258 Mich App 635, 647; 672 NW2d 860 (2003). Moreover, “jurors are presumed to follow their instructions.” *People v Roscoe*, 303 Mich App 633, 646; 846 NW2d 402 (2014). Because we find no error we also reject the implicit argument that because the jury heard multiple officers testify regarding defendant’s participation in an earlier retail fraud, error was compounded. Additionally, this evidence also survives an analysis under MRE 403 because the probative effect of this contextual evidence was not outweighed in any quantum by its prejudicial effect. This testimony was properly admitted pursuant to MRE 401, 402, and 403, without consideration of MRE 404(b), and admission of this evidence did not deprive defendant of his constitutional right to a fair trial. Finally, even if admission of any part of this testimony was plain error, in light of the substantial evidence to support defendant’s conviction, defendant cannot establish that any error affected the outcome of the lower court proceedings. Therefore, reversal would not be required. *Carines*, 460 Mich at 763-764.

Defendant also argues that there was insufficient evidence to support his conviction. This Court reviews *de novo* a claim of insufficient evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). This Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Carines*, 460 Mich at 757. In addition,

¹ The prosecution also argues that the testimony is admissible as direct, substantive evidence of defendant’s guilt. However, the trial court did not admit the testimony for this purpose, and we decline to decide this issue.

“[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *Id.* (citation omitted).

Defendant was convicted of MCL 333.7401c which states, in relevant part, that a person “shall not” do either of the following:

(a) Own, possess, or use a vehicle, building, structure, place, or area that he or she knows or has reason to know is to be used as a location to manufacture a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.

(b) Own or possess any chemical or any laboratory equipment that he or she knows or has reason to know is to be used for the purpose of manufacturing a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.

Possession may be either “actual or constructive,” and “[c]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant” and the items in question. *People v Wolfe*, 440 Mich 508, 520, 521; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Cohen*, 294 Mich App 70, 76-77; 816 NW2d 474 (2011) (citation omitted). In addition, “[c]ircumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of possession.” *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005) (citation omitted). Further, “because it can be difficult to prove a defendant’s state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant’s state of mind, which can be inferred from all the evidence presented.” *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

In the present case laboratory glassware and chemicals were found in a tent located on city-owned property which the defendant admitted was his residence. He also admitted to altering chemicals in the tent to make hydrochloric acid and sulfur, as well as to knowing that the ingredients found in the tent could be combined to produce methamphetamine. In addition, a witness who was qualified as an expert in the production and manufacturing of methamphetamine testified that the glassware and chemicals found in defendant’s tent were consistent with the equipment and substances used to manufacture methamphetamine. Moreover, the expert testified that a digital scale and small plastic bags found in the tent were consistent with items typically used to package illegal drugs such as methamphetamine. The evidence regarding defendant’s tent and its contents was sufficient to support a finding that defendant possessed a place, area, chemicals, or laboratory equipment that he knew was to be used to manufacture methamphetamine. *Kanaan*, 278 Mich App at 622; *McGhee*, 268 Mich App at 623.

The evidence presented at trial also supported a finding that defendant constructively possessed the other items found on a grill and under a tarp located near his tent. The grill and tarp were approximately 50 yards away from defendant’s tent, and that the tent was visible from the area where the grill and tarp were located. Further, several of the items found under the tarp were identical to the items found in defendant’s tent. This circumstantial evidence, and the reasonable inferences, arising from it, provided satisfactory proof that defendant constructively

possessed the items found by the grill and under the tarp. *McGhee*, 268 Mich App at 623. As with the items in defendant's tent, the expert witness also testified that the glassware and substances found on the grill and under the tarp were all common items used in manufacturing methamphetamine. Again, the evidence regarding the contents of the grill and tarp was sufficient to support a finding that defendant possessed a place, area, chemicals, or laboratory equipment that he knew was to be used to manufacture methamphetamine. *Kanaan*, 278 Mich App at 622; *McGhee*, 268 Mich App at 623.

Viewing all of the evidence in the light most favorable to the prosecution, a jury could find that the prosecution proved beyond a reasonable doubt that defendant owned, possessed, or used an area that he knew, or had reason to know, was to be used as a location to manufacture methamphetamine, or that defendant owned or possessed any chemical or any laboratory equipment that he knew, or had reason to know, was to be used for the purpose of manufacturing methamphetamine. Therefore, there was sufficient evidence to convict defendant of operating or maintaining a laboratory involving methamphetamine pursuant to MCL 333.7401c(1), and defendant cannot establish that his constitutional due process rights were violated by a conviction based on insufficient evidence.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Cynthia Diane Stephens